

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

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VICTOR TORRES,

97 CV 4406

Petitioner,

MEMORANDUM

AND

- against -

ORDER

DAVID MILLER, Superintendent,

Respondent.

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VICTOR TORRES
93-A-2700
Eastern Corr. Facility
P.O. Box 338
Napanoch, New York 12458
Petitioner pro se.

CHARLES J. HYNES
District Attorney, Kings County
(Andrew P. Leff, of counsel)
400 Municipal Building
210 Joralemon Street
Brooklyn, New York 11201

NICKERSON, District Judge:

Petitioner pro se brought this proceeding for a writ of habeas corpus pursuant to 28 U.S.C. § 2254, challenging his conviction and sentence.

c/m

On February 13, 1992, petitioner robbed Maria Alvarez and her two sons at gunpoint at the intersection of Broadway and Pulaski Streets in Brooklyn. On February 24, 1992, at the same intersection, petitioner robbed Anna Carasquillo and Marilyn Gonzalez at gunpoint.

After a jury trial, petitioner was convicted in Supreme Court, Kings County, of three counts of Robbery in the First Degree. On March 22, 1993 petitioner was sentenced as a second felony offender to a term of imprisonment of sixteen to thirty-two years--two consecutive eight to sixteen years terms for the Alvarez and Gonzalez robberies, and a concurrent eight to sixteen year term for the Carasquillo robbery.

Petitioner appealed to the New York Supreme Court, Appellate Division, Second Department, challenging his conviction and sentence. Petitioner claimed (1) that the trial court's charge to the jury was erroneous, (2) that the prosecutor's summation improperly shifted the burden of proof to the defendant, (3) that one of the

People's witnesses improperly bolstered the identification of the defendant by one of the victims, and (4) that the sentence imposed was unduly harsh and excessive. His conviction and sentence were affirmed on March 13, 1995. People v. Torres, 213 A.D.2d 503, 623 N.Y.S.2d 641 (2d Dept. 1995). The Appellate Division held that the claim concerning the court's charge to the jury was not preserved for appellate review, and that the remaining claims "are either unpreserved for appellate review of without merit." Id.

At the same time, Petitioner moved pro se on May 3, 1996 to vacate his conviction on the ground that he received ineffective assistance of trial counsel. The Supreme Court, Kings County, denied that motion on July 16, 1996. The Appellate Division denied leave to appeal that decision on October 29, 1996.

The petitioner sought leave to appeal the Appellate Division's March 13, 1995 decision to the Court of Appeals. That request was denied on August 1,

1996. People v. Torres, 88 N.Y.2d 996, 649 N.Y.S.2d 403 (1996).

On July 15, 1997 petitioner moved to vacate the Appellate Court's March 13, 1995 decision by writ of error coram nobis, alleging ineffective assistance of appellate counsel. That motion was denied on November 24, 1997. People v. Torres, 665 N.Y.S.2d 932 (2d Dept. 1997).

Petitioner filed a petition for writ of habeas corpus in this Court on July 28, 1997. The petition raises the same four claims presented to the Appellate Division on direct appeal.

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The Act provides that a state prisoner's application for a writ of habeas corpus shall not be granted with respect to any claim that was adjudicated on the merits in state court proceedings unless that adjudication (1) "resulted in a decision that was contrary to, or involved an unreasonable application

of, clearly established Federal law, as determined by the Supreme Court of the United States," or (2) was "based on an unreasonable determination of the facts in light of the evidence presented at the State Court proceeding." 28 U.S.C. § 2254(d)(1). Findings of fact by the state court are presumed to be correct, and the petitioner bears the burden of rebutting this presumption by "clear and convincing evidence." 28 U.S.C. § 2254(e)(1).

Petitioner's first claim, concerning the trial court's charge to the jury, was denied by the Appellate Division on the basis of an adequate and independent state ground. The Appellate Division found that this claim was not preserved for appellate review because petitioner did not comply with New York State's contemporaneous objection rule. People v. Torres, 623 N.Y.S.2d at 641. Consequently, this Court cannot consider the merits of a federal constitutional claim concerning the jury charge. See Coleman v. Thompson, 501 U.S. 722, 729--30 (1991).

Petitioner's second claim is that the prosecutor's summation improperly shifted the burden of proof to the defendant, in violation of his right to due process. A prosecutor's remarks during summation are grounds for reversal "only when the remarks caused 'substantial prejudice' to the defendant." Gonzalez v. Sullivan, 934 F.2d 419, 424 (2d Cir. 1991). In light of the evidence of petitioner's guilt and the corrective instruction given by the trial judge, the state court's determination that the prosecutor's remarks did not cause substantial prejudice to the defendant is not an unreasonable determination of the facts warranting habeas relief.

Petitioner's third claim, that a witness for the People improperly bolstered the eyewitness's testimony, does not raise a federal constitutional claim cognizable on habeas corpus. This is a state evidentiary matter based on state law, and is beyond

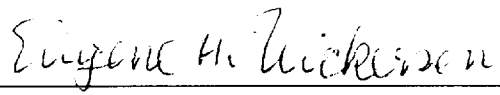
the scope of this Court's review. See Estelle v. McGuire, 502 U.S. 62, 67--68 (1991).

Finally, petitioner claims that the sentence imposed on him was unduly harsh and excessive. A sentence within the range prescribed by law is not grounds for relief in federal habeas corpus review. See Briecke v. State, 936 F. Supp. 78, 85 (E.D.N.Y. 1996).

The petition is denied. A certificate of appealability will not be issued because petitioner has not made a substantial showing of the denial of a constitutional right. 28 U.S.C. § 2253; see Reyes v. Keane, 90 F.3d 676, 680 (2d Cir. 1996).

So ordered.

Dated: Brooklyn, New York
May 5, 1998


Eugene H. Nickerson, U.S.D.J.